

# MASSERS

## EMPLOYMENT LAW UPDATE

August 2018

### **Victimisation and bad faith**

In *Saad v Southampton University Hospitals NHS Trust*, the Employment Appeal Tribunal (EAT) considered whether to uphold a victimisation claim where the claimant had an ulterior motive for lodging a grievance.

Victimisation occurs when an employer subjects a worker to a detriment because the worker has done a protected act, or the employer believes they may do so. Acts will not be protected if made in bad faith. In this case, the protected act was an allegation that the employer had breached the Equality Act 2010. The Claimant claimed to have suffered racial or religious discrimination. He presented his grievance at a time when performance issues had been raised and around four years after the alleged incident took place. The Trust argued that he could not rely on the protected act as it had been made in bad faith and as a way of delaying the performance review process.

The EAT found that the motivation for making the complaint was not of primary importance. What mattered was whether the Claimant reasonably believed the complaint to be true, i.e. that he believed he had suffered discrimination.

### **TUPE**

In *Colino Siguenza v Ayuntamiento de Valladolid* the ECJ ruled that a 5 month cessation of an undertaking's activities did not preclude a TUPE transfer taking place.

The Claimant was a teacher in Spain. The local authority assigned the school's management to a contractor, who dismissed all the staff in March 2013 following a dispute. Around a week later, the contractor ceased all its activities. In August, the school assigned its management to a new contractor which started activities in September.

The ECJ held that neither the 5 month gap (of which 3 months was the summer holiday) nor the failure by the new contractor to engage any of the dismissed staff, would necessarily prevent a ruling that a TUPE transfer had taken place.

### **Remote working**

The University of the West of England has published findings of a study which examined the habits of 5,000 rail commuters travelling into London. The study found that 54% of commuters were using the train's wi-fi to send work emails, with further commuters using their own mobile network.

The findings of the University's study raise the question of whether the daily commute ought to be included as part of the working day, and if so, whether it would be practicable for employers to monitor how the time was being spent. The possibility of a better work-life balance has to be weighed against the risk of increased stress for workers where there is no clear start and end to the working day, and it is ever harder to switch off from work.

Another practical point to consider, and ever more so in light of the GDPR, is whether companies have adequate procedures in place to ensure the security of personal data in circumstances where remote working has become the norm.

*Source: BBC News, Emails while commuting should count as work, 30<sup>th</sup> August 2018*

### **PwC allows new staff to elect own working hours**

The advances in smart phones and technology mean it is now in theory much easier for workers to fit work around their lifestyle, with flexible working on the increase. A recent YouGov survey revealed that only 6% of UK workers work the traditional hours of 9 to 5, with nearly half of people working flexible hours or being part of a job share arrangement.

PwC has launched a scheme enabling new recruits to list their preferred working hours and skill set when applying for work, with the information then being used to match them to relevant projects rather than roles. The aim is to attract talented workers who don't want to be restricted to working 9 to 5 and, in the two weeks since the scheme was launched, over 2,000 people have registered. The scheme comes on the back of a study showing that respondents prioritised flexible working and a good work-life balance when looking for work.

*Source: BBC News, PwC tells new staff they can choose what hours to work, 30<sup>th</sup> August 2018*

### **Drop in sickness absence**

The Office of National Statistics have released figures showing that employees took an average of 4.1 days off sick in 2017. When records started in 1993, the average was 7.2 days.

Sickness in the public sector accounted for 2.6% of working hours lost, as against 1.7% in the private sector.

It has been suggested that the drop in absence can perhaps be attributed to a culture of presenteesim as opposed to a healthier workforce. Rates of absence were greater in larger firms, with the ONS suggesting that workers in smaller firms may be under greater pressure to make up hours lost to sickness absence.

*Source: Personnel Today, Sickness absence dropped to record low in 2017, 31<sup>st</sup> July 2018*

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